71-1657

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1972

ELVIN SCOTT, JR.

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Appeal from the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Raymond M. Foley

Attorney for Appellant

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Raymond M. Faby
4930 Belair Road
Baltimore, Maryland 21206

Attorney for Appellant

ELVIN SCOTT, JR. vs. UNITED STATES OF AMERICA -- IN THE SUPREME COURT OF THE UNITED STATES.

PETITION FOR CERTIORARI TO REVIEW DECISION OF THE COURT OF APPEALS OF MARYLAND.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Now comes the Appellant, Elvin Scott, Jr., by Nathan Stern, Raymond M. Faby and Faby & Milburn, his attorneys, and herein requests that this Court review the decision of the Court of Appeals of Maryland and herein states:

1. That the Court of Appeals of Maryland erred in affirming the decision of the Court of Special Appeals of Maryland which affirmed the lower court's Jury's decision in convicting the Appellant of unlawful possession of heroin.

2. That the Court of Appeals of Maryland erred in affirming the Court of Special Appeals of Maryland which affirmed the lower court's Jury's decision in convicting the Appellant of unlawful possession of certain controlled paraphernalia.

3. That the Court of Appeals of Maryland erred in affirming the Court of Special Appeals of Maryland which affirmed the lower court's Jury's decision not to grant the Appellant's Motion for Judgment of Acquittal at the conclusion of the State's case.

4. That the Court of Appeals of Maryland erred in affirming the Court of Special Appeals of Maryland which affirmed the lower court's decision not to grant the Appellant's Motion for Mistrial.

5. That the Court of Appeals of Maryland erred in not considering the issue that the Appellant's rights as outlined in the Fourth Amendment of the United States Constitution were violated.

WHEREFORE, your Appellant prays that the Petition for Certiorari to Review the Decision of the Court of Appeals of Maryland be granted.

S/ Elvin Scott, Jr.
Appellant

S/Nathan Stern
1305 Court Square Building
Baltimore, Maryland 21202
539-3220

S/ Raymond M. Faby
Faby & Milburn
4930 Belair Road
Baltimore, Maryland 21206
483-4400

Attorneys for Appellant.

I hereby certify that on this 4th day of May, 1972, 40 copies of the aforegoing Petition for Certiorari to Review Decision of the Court of Appeals of Marvland were mailed to the Supreme Court of the United States; that notice was given to the Attorney General's Office of Maryland, 1 So. Calvert Street, Balto., Md., 21201 and to the Court of Appeals of Maryland, Annapolis, Md., 21404.

S/ Raymond M. Faby

COURT OF APPEALS OF MARYLAND, MISCELLANEOUS DOCKET (Criminal) No. 334, September Term, 1971.

Elvin Scott, Jr. v. State of Maryland.

Raymond M. Faby, Attorney for Petitioner.

Francis B. Burch, Attorney for Respondent.

Date; January 13, 1972.

STATE OF MARYLAND, Sct:

Receipt is hereby acknowledged of a petition for writ of certiorari filed in the above entitled case.

You will be notified when action is taken by the Court.

S/ James H. Norris, Jr.
Clerk of the Court of Appeals of Maryland.

Elvin Scott, Jr. v. State of Maryland. In the COURT OF APPEALS OF MARYLAND, Miscellaneous Docket No. 334 (Criminal) September Term, 1971 (No. 308, September Term, 1971 Court of Special Appeals)

ORDER -- Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

S/ Hall Hammond
Chief Judge

Date: February 15, 1972.

UNREPORTED IN THE COURT OF SPECIAL APPEALS OF MARYLAND - No. 308, September Term, 1971 - ELVIN SCOTT, JR. v. STATE OF MARYLAND. Anderson, Thompson, Gilbert, JJ. Per Curiam. Filed: December 13, 1971.

Elvin Scott, Jr., appellant, was convicted by a jury presided over by Judge Albert L. Sklar of (1) possession of heroin, (2) possession of paraphernalia and (3) resisting arrest. He was sentenced to two concurrent four year terms on the narcotics law violations and one year for resisting arrest, which term is to be served consecutively with the concurrent terms.

Appellant raises five questions:

"1. Did the jury have sufficient evidence to convict Appellant of unlawful possession of heroin?

2. Did the jury have sufficient evidence to convict Appellant of unlawful possession of certain controlled paraphernalia?

3. Did the jury have sufficient evidence to convict Appellant of resisting arrest?

4. Did the court err in not granting Appellant's motion for judgment of acquittal at the conclusion of the State's case?

5. Did the Court err in failing to grant Appellant's motion for a mistrial?"

We shall consider the first three questions as one, i.e., sufficiency of the evidence.

The testimony established that on the night of July 27, 1970, Officer Johnny Holloway, in the company of two other police officers, was operating an unmarked police car in the vicinity of Ashland Avenue and Caroline Street, in Baltimore City. They observed a group of 10 to 12 people on the northeast corner of the intersection and heard a "loud whistle." At that point in time the group dispersed. Officer Holloway testified that he saw the appellant pass a "white object" to a person later identified as Joseph Larry Lewis. Mr. Lewis immediately threw the object onto the sidewalk, and both he and appellant walked in an easterly direction on Ashland Avenue, away from the intersection. The officers recovered the "white object" which proved to be tissue wrapped around a bag that contained 100 to 112 gelatin capsules "with residue." Officer Holloway stated, "To me gelatin capsules is capsules used to package narcotic drugs." The three police officers then identified themselves as being police officers, displayed their badges and placed both the appellant and Lewis under arrest. A struggle ensued between appellant and Officer Holloway as the officer attempted to place handcuffs upon appellant. Appellant called to the crowd that began to gather and requested that someone get his mother. Marie Scott, appellant's mother, joined in the affray and, according to the officers, struck Officer Holloway, while demanding that he release her son. The son was finally subdued. Mrs. Marie Scott was tried simultaneously with her son on the charge of assault upon the police officer, but was acquitted.

A field test of one of the recovered gelatin capsules indicated the presence of a proscribed narcotic drug and subsequent analysis revealed that 65 of the capsules contained "traces of heroin hydrochloride, a narcotic,

schedule one controlled narcotic substance." Officer Brown's testimony was substantially the same as that of Officer Holloway. The State then concluded its case and appellant's motion for judgment of acquittal was denied. At the conclusion of all of the testimony, the appellant's renewed motion for judgment of acquittal was denied.

The defense produced various witnesses who testified as to their version of the events that occurred. The appellant's mother stated that appellant was not resisting arrest, but was twisting his body in order to prevent Officer Holloway from placing objects or items on appellant's person. Both the mother and appellant's sister agreed that Officer Holloway was asked by another police officer if he had found anything upon the appellant and that Holloway's response was in the negative. They said that Holloway refused a suggestion made by another policeman that Holloway release the appellant. This latter contention was corroborated by a Mrs. Elise Royster, who had been standing on the corner waiting for a friend. Mrs. Royster did not observe anyone drop the "white object".

The evidence as presented by the State and the appellant was susceptible to two different interpretations. The jury obviously chose to believe the State's witnesses. The test to be applied to a review of the sufficiency of the evidence in a jury trial is whether any relevant evidence was supplied to the jury which could have sustained the conviction. Price v. State, 5 Md. App. 127, 130 (1968); Williams and McClelland v. State, 5 Md. App. 450, 458-459 (1968).

Appellant contends:

"Even if the jury believed the testimony of the officers, and accepted without question their version of the incidents leading to

> the arrest, then the Appellant abandoned, released, discarded any possessory interest he may have held in the capsules. Upon passing the package to another individual, it must follow that he no longer possessed the merchandise, and by passing it along, he no longer had possession - either actual or constructive."

We think this contention devoid of merit. If appellant's assertion were correct, the simple method of discarding or throwing the narcotics away at the instant preceding arrest would successfully avoid conviction. Such is not the law. The duration of the possession and the quantity possessed are not material elements to prove and sustain convictions for possession of proscribed narcotics. Haley, Peterson & Roberts v. State, 7 Md. App. 18, 33 (1969).

The officers both testified that they saw the appellant pass the "white object" to Lewis. They saw Lewis throw it to the ground. The capsules in the "object" contained traces of heroin. We think this evidence, if believed by the trier of the facts, sufficient to sustain the conviction of possession. The officers also testified that the "white object" contained 100 to 112 gelatin capsules, and there was testimony to establish that such capsules are used in the "street sale" of narcotics. The testimony, if believed, was sufficient to sustain a conviction of possession of paraphernalia. Haley, Peterson, & Roberts v. State, supra. It is immaterial that only "traces" of heroin were found in the capsules. Bracey v. State, 4 Md. App. 562, 564 (1968).

Appellant's fourth question is not properly before this Court, and we shall not consider it. It is patent from the record that following Judge Sklar's denial of appellant's

motions for judgment of acquittal, the appellant then presented testimony via his defense witnesses. The presentation of such testimony constitutes a withdrawal of appellant's motions for judgment of acquittal made at the close of the State's case. Maryland Rule 755 (b); Jason v. State, 1 Md. App. 136, 138 (1967); Martin v. State, 10 Md. App. 274, 276 (1970).

We turn now to the appellant's last contention, i.e., that a mistrial should have been declared by the trial judge. The record reveals that during the cross-examination of a defense witness the following occurred:

PROSECUTOR: How many times did you talk to Mr. Murrell about the case?

A. Once.

Q. When was that?

A. The first day of the trial. Forget what day it was. One day last week.

Q. Talked to him the first day of the trial?

A. Yes.

Q. What did you tell him?

MR. MURRELL: Object to that.

PROSECUTOR: I think it's relevant. I want to find out if in fact, the Defendant was intended to be called as a witness. (Emphasis supplied).

MR. MURRELL: Wait a moment, now. Let me approach the bench.

(The following took place at the bench, out of hearing of the Jury).

MR. MURRELL: I am going to move for a mistrial. Reference here whether the Defendant was to be called as a witness in this case and I'm going to move for a mistrial at this point.

COURT: The reason I suggested you gentlemen come here at the bench, she said she talked to Mr. Murrell once the first day of the trial. Nothing wrong with that. The day of the trial doesn't mean during the trial. Could have been questioned before the trial started. Still the first day of the trial.

PROSECUTOR: Witness on the stand; wonder if you could make an instruction to the Jury.

COURT: You're making a mountain out of a mole hill.

MR. MURRELL: The statement he made now to this Jury is obviously prejudicial.

COURT: In what way? Wants to find out whether the Defendant was going to be called as a witness.

PROSECUTOR: I didn't say Defendant.

MR. MURRELL: Exactly what he said.

PROSECUTOR: Witness on the stand.

COURT: I didn't get that impression, but the Reporter took it down.

PROSECUTOR: I meant to say the witness as a witness.

MR. MURRELL: That is not what he said.

PROSECUTOR: Meant to come out the witness called as a witness.

COURT: You think it's prejudicial?

MR. MURRELL: I think it is, definitely.

PROSECUTOR: I think an instruction to the Jury to disregard it at this point and mention the fact the witness to be called as a witness.

* * *

Defense counsel declined to ask for an instruction that the Jury disregard the question because he asserted that such an instruction would emphasize the fact. However, he continued to press for the mistrial. Judge Sklar then observed:

> "Gentlemen, I don't think that the asking of the question in the course of many, many questions asked on cross-examination is prejudicial at this point. I don't mind telling you, I was writing notes at the time the questions were being asked, but I didn't get my first impression, I didn't get it was the Defendant who was mentioned as being a witness or contemplated as being a witness. Without asking you to withdraw your motion, Mr. Murrell, I'll do one of two things. First, I'm going to deny your motion for a mistrial. Secondly, I will either sustain your objection to the question that was asked without further asking Mr. Howard to reframe it, or I can instruct the Jury as to the fact that the question was asked by error by Mr. Howard, referring to the Defendant, Elvin, taking the stand, when he meant that the witness was to be a witness taking the stand. You don't

have to take either option."

At the close of the entire case defense counsel specifically requested the court not to instruct the jury relative to the failure of the defendant to take the stand.

It is well settled in this state that the question of whether or not to grant a mistrial is vested in the sound discretion of the trial judge. His ruling will not be disturbed on appeal without full regard being given to the fact that the trial judge is in an advantageous position to weigh the question of prejudice. Carroll v. State, 3 Md. App. 50, 53 (1968); Avey v. State, 1 Md. App. 178, 188 (1967); Baldwin v. State, 5 Md. App. 22, 28 (1968).

Under the totality of the circumstances present in this case, we cannot say that the trial judge erred in finding that the prosecutor's statement was not prejudicial. We think it obvious that the prosecutor stumbled in his choice of words. However, this "slip-of-the-tongue" did not constitute prejudice to the appellant. Nor can we construe the prosecutor's question as a comment on the failure of a defendant to testify that has been prohibited by Dill v. State, 10 Md. App. 362, 363, 364 (1970). Moreover, unlike Dill, defense counsel in this case specifically requested the court not to instruct the jury relative to the appellant's declination to testify. The trial judge was in a position to best determine whether or not the appellant was prejudiced by the Assistant State's Attorney's imprudent phrasing of a question. The trial judge concluded that no prejudice was present. We perceive no error.

JUDGMENTS AFFIRMED.
APPELLANT TO PAY THE
COSTS.